80-1772

No. 80-

Office-Supreme Court, U.S.
FILED
APR 21 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

ULECIOUS BUCHANAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

JOHN B. GUNN
JAMES CHRISTOPHER COOK
WALKER & WILLIAMS, P. C.
4343 West Main Street
Belleville, IL 62223
(618) 277-1000
Attorneys for the Petitioner

April, 1981

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

It has long been settled that the preservation for litigants in FELA cases of the right to trial by jury is an important matter whose curtailment will be closely scrutinized. This case presents two related questions concerning:

1. Whether the trial court usurped the jury's function by ordering a new trial on a ground waived by the respondent where such ruling violates the purpose of the Federal Employers' Liability Act, the Seventh Amendment to the United States Constitution, *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493, (1957), and its progeny; and

2. Whether, in an FELA case where the trial court expressly found respondent's credibility to be the major jury issue, the trial court can overturn the jury's verdict and order a new trial on a ground not objected to or otherwise preserved by the respondent whose version of the facts was absolutely and completely rebutted by an eyewitness.

CORPORATE AFFILIATIONS

The Missouri Pacific Railroad Company and the Southern Pacific Transportation Company are corporate parents of the Alton & Southern Railway Company, petitioner. The petitioner has no other corporate parents, subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Affiliations	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
How the Federal Questions Were Presented	5
Reasons for Granting the Writ	7
1. This Court has Recognized Its Obligation to Correct Improper Administration of the FELA so as to Preserve Federal Constitutional and Statutory Guarantees of the Right to a Jury Determination	7
2. The Decision Below is Contrary to Applicable Decisions of This Court and Is Erroneous	10
3. By Failing to Timely Object to Allegedly Prejudicial Testimony, Respondent Waived the Sole Ground for Ordering a New Trial	11
4. The Questions Are Important	12
Conclusion	13

PRECEDING PAGE WAS BLANK

Appendices

A. Opinion of The Illinois Appellate Court A-1

B. Notice & Order of the Illinois Supreme Court denying Leave to Appeal A-9

C. Order of the Illinois Supreme Court Staying Mandate A-12

D. Order of the Circuit Court, Third Judicial Circuit, Madison County, Illinois granting a New Trial on Respondent's Motion A-13

E. Excerpts from the Trial Record A-14

TABLE OF AUTHORITIES

Cases

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 77 S.Ct. 443, 1 L. Ed. 2d 493, (1957).....6,7,12,13

Tiller v. Atlantic Coastline R.R. Co., 318 U.S. 54, 67-68, 63 S.Ct. 444, ____, 87 L. Ed. 610, 618, (1943) 7

Bailey v. Central Vermont Ry. Co., 319 U.S. 350, 353-354, 63 S.Ct. 1062, ____, 87 L. Ed. 1444, 1447-1448, (1943) 7

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 32-33, 64 S.Ct. 409, ____, 88 L. Ed. 520, 524, (1944) 7

Harris v. Pennsylvania R.R. Co., 361 U.S. 15, 80 S.Ct. 22, 4 L. Ed. 2d 1, (1959) 7,12

Dennis v. Denver & Rio Grande Western R.R. Co., 375 U.S. 208, 210, 84 S.Ct. 291, ____, 11 L. Ed. 2d 256, 258, (1963) 10

McBride v. Toledo Terminal R.R. Co., 354 U.S. 517, 77 S.Ct. 1398, 1 L. Ed. 2d 1534, (1957) 10

Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 363, 72 S.Ct. 312, ____, 96 L. Ed. 398, 404, (1952) 10

Myers v. Reading Co., 331 U.S. 477, 478, 67 S.Ct. 1334, ____, 91 L. Ed. 1615, 1616, (1947) 10

Lavender v. Kurn, 327 U.S. 645, 654, 66 S.Ct. 740, ____, 90 L. Ed. 916, 923, (1946) 10

Estelle v. Williams, 425 U.S. 501, 509-513, 96 S.Ct. 1691, ____, 48 L. Ed. 2d 126, 134-135, (1976) 11

Wainwright v. Sykes, 433 U.S. 72, 91, 97 S.Ct. 2497, ____, 53 L. Ed. 2d 594, 610, 611, (1977)..... 11

Miranda v. Arizona, 384 U.S. 436, 498, 86 S.Ct. 1602, ____, 16 L. Ed. 2d 694, 737, (1966)..... 2

Johnson v. Bennett, 395 Ill. 389, ____, 69 N.E.2d 899, 903-904, (1946) 11

Forest Preserve District v. Lehmann, 388 Ill. 416, ____, 58 N.E.2d 538, 545, (1945)..... 12

Robbins v. Professional Construction Co., 72 Ill. 2d 215, ____, 20 Ill. Dec. 577, 579-580, 380 N.E.2d 786, 788-789, (1978) 2

Constitutional Provisions

Seventh Amendment to the United States Constitution 2

Statutes

28 U.S.C. § 1257(3) 2,6

45 U.S.C. § 51 2,3

Miscellaneous

Cleary & Graham, Handbook on Illinois Evidence, § 103.3, at 7-8, (3d ed., 1979) 12

Cleary, Handbook on Illinois Evidence, § 1.12, at 9-10, (1956) 11

No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

ULECIOUS BUCHANAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

OPINION BELOW

The opinion of the Illinois Appellate Court, Fifth District, is unreported, but is appended hereto at pages A-2 to A-8. The order denying petitioner's petition for leave to appeal to the Supreme Court of Illinois and that court's order staying the mandate of that court appear at pages A-9 to A-12.

JURISDICTION

The judgment of the Illinois Appellate Court, Fifth District, was entered on September 19, 1980. Petitioner's timely petition for leave to appeal was denied by the Supreme Court of Illinois

on January 30, 1981, and that court stayed its mandate by order entered on February 16, 1981. This petition for certiorari was filed within 90 days of denial of leave to appeal. No petitions for rehearing have been or will be filed with the state courts. This Court's jurisdiction is invoked under 28 U.S.C.§ 1257(3).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment to the United States Constitution

"In Suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

35 Stat. 65, As Amended, 45 U.S.C. § 51.

> *"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*
>
> "Every common carrier by railroad while engaging in commerce between any of the several States and Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury

---

[1] In Illinois, once the appeal process has ended relative to direct appeal of an order granting a new trial, later appeals cannot address the propriety of the grant of a new trial. *Robbins* v. *Professional Construction Co.*, 72 Ill. 2d 215, , 20 Ill. Dec. 577, 579-580, 380 N.E.2d 786, 788-789, (1978). In this circumstance, the decision below constituted a final judgment under 28 U.S.C. § 1257(3). *Miranda* v. *Arizona, 384 U.S. 436, 498, 86 S.Ct. 1602, , 16 L. Ed. 2d 694, 737, (1966).*

while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment."

STATEMENT OF THE CASE

The Evidence

Respondent instituted this action in an Illinois State Court under the Federal Employers' Liability Act, 45 U.S.C. § 51, to recover damages for a back injury which allegedly occurred on February 22, 1976, while working as a hostler helper for petitioner railway company. (C. 2-5)

At trial, respondent testified that, on the day in question, he drove to work in his own car, but stopped at a girlfriend's home and walked the remaining 4 blocks to work — arriving at approximately 6:45 a.m. (R. 50, 71-72) He claimed he was cleaning the interior of a locomotive engine and that, thereafter, he was dismounting from the engine by means of a ladder when he slipped and fell injuring his back. (R. 54) Respondent denied having been out until 2:00 a.m. the night before his alleged fall. (R. 70-71) He stated that his foreman was not with him when he allegedly fell and he denied being discovered asleep on the locomotive engine by his foreman immediately prior to the alleged fall. (R. 97, 99, 118) Respondent's testimony was directly refuted by the foreman, Euwald Milkert, who testified that on the morning of the alleged accident, respondent appeared to be very tired and abnormally loud. (R. 237) Milkert said he

found respondent asleep on a locomotive engine and that it took him 2 attempts to awaken him. (R. 222-223) He then testified that he watched as respondent was dismounting the locomotive engine. Milkert testified that respondent did not slip or fall from the ladder on the outside of the locomotive and respondent had no difficulty whatsoever in dismounting. (R. 223-225) Shortly thereafter, respondent reported the alleged fall to Milkert. (R. 223-225)

The trial court found that respondent's credibility was a major issue in the case because he said he walked to work after leaving his automobile with a girlfriend (as opposed to arriving with a red-wigged person), he denied being in a drowsy condition that morning and there was evidence respondent was drinking and dancing far into the night and morning before the alleged fall. (R. 45C, 172D, 172G-H) The court therefore permitted petitioner to call as a witness, Dennis Korando, who was going to testify that respondent requested that he tell an acquaintance outside the railroad yard that respondent had to work that day and could not get off work to leave with the acquaintance. (R. 172D, 172E, 172F, 172G-H, 172I) The only objection made by respondent's counsel to Korando's testimony was that he was surprised by Korando, who had not previously been disclosed as a witness. (R 172A) The court overruled that objection, permitted respondent's attorney to briefly speak with the witness, and then permitted Korando to testify. (r. 172G-H) No objection was made by respondent's counsel to Korando's testimony on grounds of unfair prejudice. (R. 172A, 192) Korando said the black person in the car wore a red wig, although he could not say whether the person was male or female. (r. 192)

In his closing argument, respondent's attorney repeatedly referred to Kornado's testimony in offensive racial terms. He accused petitioner of fabricating the story about the black person waiting for respondent outside the railroad yard and he called that person a "creature" and "black thing." (R. 365-368)

Neither racial references nor offensive characterizations were made by petitioner railroad's attorney. (R. 392-393, 406-407 & 421)

At the close of trial, the jury returned a verdict in favor of the petitioner railroad and against the respondent. (R. 440-442) Thereafter, the court granted a new trial on motion by the respondent. (C. 136) The ground relied upon by the court in granting a new trial was that Dennis Korando's testimony concerning 6 foot 4 inch, 230 pound, black individual adorned in a red wig who was waiting for respondent outside the railroad yard raised a prejudicial and inflammatory inference of black homosexuality. (C. 136) This was the sole ground relied upon by the court in granting a new trial.

Respondent has adopted petitioner's factual statements before both reviewing courts in Illinois. (Respondent's Ill. App. Answer & Brief at 1, and Ill. Answer at 1)

How The Federal Questions were Presented

Petitioner asserted its interrelated Federal claims at every appropriate level of the Illinois court system.

At trial, when Dennis Korando was called as a witness, there was no objection by respondent to his testimony on grounds of prejudice. Thus, respondent waived the alleged error on which the court based its order of a new trial. Respondent sought a new trial by means of a post-trial motion which was allowed by the court. The argument of counsel on the motion was not recorded, but the Federal claims raised here were vigorously argued to the trial court at that time.

In the Illinois Appellate Court, petitioner presented its Federal claims by arguing in its petition seeking leave to appeal that the trial court had erred in granting a new trial in violation of the purpose of the Federal Employers' Liability Act, the Seventh Amendment to the United States Constitution and

Rogers v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 509, 77 S.Ct. 443, , 1L. Ed. 2d 493, 501, (1957). Petitioner also expressly argued that, even if the testimony regarding the red-wigged, black individual was inadmissible, it was not properly objected to, was isolated and completely harmless in view of the overwhelming nature of the other testimony in the case — particularly that of Euwald Milkert who testified that plaintiff's alleged fall did not occur. (Ill. App. Pet., pp. 32-35) The Illinois Appellate Court thereafter allowed the petition for leave to appeal and the issue was again raised in the appellate court in appellant's brief (Ill. App. brief, pp. 34-37). In its unpublished decision, the appellate court held that no legitimate purpose could be served by Korando's testimony, therefore, a specific objection to the testimony on grounds of surprise was unnecessary. (Slip opinion at A-7) Although the trial court attempted to avoid the question of sufficiency of evidence in granting a new trial, the Illinois Appellate Court stated that respondent's objection to Korando's testimony on grounds of surprise was "sufficient to preserve plaintiff's challenge of the sufficiency of the evidence in his motion for a new trial." (Slip opinion at A-7) The court expressly passed on the questions presented herein. (Slip opinion at A-7-A-8)

The objection to usurpation of the jury's function was again raised in the petition for leave to appeal to the Illinois Supreme Court. (Ill. Pet., pp. 42-46). Essentially the same argument concerning usurpation of the jury's function and waiver was made by petitioner at the post-trial motion hearing and at each level of review subsequent to the trial court's granting of a new trial.

The petition for leave to appeal to the Illinois Supreme Court was denied on January 30, 1981. Thus, the Illinois Appellate Court, Fifth District, is the "highest court in [the] state in which decision could be had." 28 U.S.C. § 1257.

REASONS FOR GRANTING THE WRIT

1. This Court has Recognized Its Obligation to Correct Improper Administration of the FELA so as to Preserve Federal Constitutional and Statutory Guarantees of the Right to a Jury Determination.

The jury's verdict in favor of the petitioner and against the respondent is based on conflicting evidence consisting of the plaintiff's version of his alleged fall as opposed by the testimony of an attentive eye-witness, Euwald Milkert, who said respondent did not slip or fall from the locomotive engine. In the past, this Court has repeatedly stated that the litigants' right to a jury trial is to remain undisturbed under the Federal Employers' Liability Act and will be jealously guarded by this court which will exercise its power of review in any case where it appears that the litigants have been improperly deprived of the jury's determination. E.g., *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 509, 77 S.Ct. 443, , 1 L. Ed. 2d 493, 501, (1957); *Tiller* v. *Atlantic Coastline R.R. Co.*, 318 U.S. 54, 67-68, 63 S.Ct. 444, , 87 L. Ed. 610, 618, (1943); *Bailey* v. *Central Vermont Ry. Co.*, 319 U.S. 350, 353-354, 63 S.Ct. 1062, , 87 L. Ed. 1444, 1447-1448, (1943); *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32-33, 64 S.Ct. 409, , 88 L. Ed. 520, 524, (1944); *Harris* v. *Pennsylvania R.R. Co,* 361 U.S. 15, 80 S.Ct. 22, 4 L. Ed. 2d 1, (1959). In the instant case, the trial court granted a new trial after hearing the jury's verdict because, allegedly, the testimony of Dennis Korando which directly refuted plaintiff's credibility and testimony concerning physical condition raised an inference of black homosexuality. Respondent's objection to that testimony, however, was untimely in that it was not made at the time the testimony was given. At no time did respondent move to strike the testimony or have the jury instructed to disregard it. Instead, respondent objected to the testimony on grounds of prejudice for the first time only when he learned what the jury's verdict was. In fact, the supposed prejudicial inference objected to at that late time was isolated

and entirely harmless in that it consisted of a single remark by Korando as to the fact that he did not know whether an acquaintance waiting for respondent in a car outside the railroad yard was male or female. Korando was only able to describe the individual as large middle-aged black person wearing a red wig. (R. 192)

It is settled that litigants in FELA cases have a paramount right to determination of disputed factual issues by a jury under the Seventh Amendment to the United States Constitution. In this case, the trial judge expressly found that the respondent's credibility was the major issue in the case. In a chambers conference, the trial judge repeatedly expressed his major concern with the respondent's credibility. (R. 172D; 172F; 172G-H) He expressly held that the question of how respondent got to work and who brought him to work was relevant. (R. 172G) Thereafter, Dennis Korando gave his description of the person waiting for respondent outside the railroad yard — the person believed by petitioner to have brought respondent to work shortly before. At no time thereafter did the court reverse its finding of relevance as to the identity of the individual waiting in an automobile. Respondent neither denied that the individual in an automobile existed nor did he disclose the identity of that individual.

The only timely objection which respondent made to Korando's testimony was that he was surprised by Korando's presence as a witness. At no time during the trial did plaintiff object or move to strike Korando's testimony on the specific ground that it was prejudicial or that such prejudice outweighed the testimony's probative value. (R. 172) At no time did plaintiff move to have the jury instructed to disregard the testimony nor did he move for a mistrial. Instead, in his closing argument, respondent's attorney grossly exaggerated the isolated reference to the bewigged black person in a car. He called the black man a "creature" (R. 365), and a "black thing" with a wig. (R. 368) Respondent's attorney's entire closing argument was infected

with grossly offensive racial references. In contrast, petitioner's attorney engaged in no such racial references and stated that his fear of prejudice was that virtually everyone in the community had a grievance against the railroads, the major industry in the community. (R. 392-393, 406-407 & 421)

The venue in which the instant action was filed is a major FELA forum with substantial verdicts often being obtained against the railroads doing business in that area. [2] Railroading is a major industry in that forum and, because of public inconvenience caused by railroad operations there, it is not difficult to inflame the passions of jurors by alleging misconduct or unfairness by a railroad. Such arguments were engaged in by respondent's counsel in this case on the fiction that the petitioner railroad fabricated a story about the red-wigged black person waiting in a car. Respondent's attorney grossly exaggerated the single reference to the red-wigged black person, apparently under a delusion that the jury would be swayed by that irrelevant and grossly improper and exaggerated closing argument. Careful review of the record discloses that petitioner did not in any way make an issue of the fact that plaintiff was a black man or of the supposed inference of black homosexuality which was described in respondent's post-trial motion. (R. 392-395) On the contrary, Korando's testimony and the lack of specific objections on grounds of prejudice disclose that the suggested inference of black homosexuality which, if even arguably present, was solely a figment of the imagination of respondent's attorney as evidenced by his closing argement. By repeatedly characterizing the red-wigged black man as a "creature" or "thing" (R. 172A) the respondent's attorney himself raised an inference of

---

[2] The FELA gives plaintiffs extraordinary forum shopping opportunities in that suit may be instituted in the district of defendant's residence, the district in which the cause of action arose or in any district wherein the defendant is "doing business." 45 U.S.C. § 56. Suit may be brought in Federal or State court with removal being prohibited. 28 U.S.C. § 1445(a).

racial prejudice or wrongdoing by the respondent to which neither Korando nor petitioner's attorney contributed. After unsuccessfully using offensive racial characterizations as a sword in the crassest of trial strategies, respondent should not now be permitted to use the tactic as a shield with which to obtain a new trial by falsely accusing petitioner of injecting prejudicial inferences in the trial.

2. The Decision Below Is Contrary To Applicable Decisions Of This Court And Is Erroneous.

In this case, based on the eye-witness testimony of Euwald Milkert as to the fact that plaintiff did not slip or fall from the locomotive engine, it is apparent that there is an evidentiary basis for the jury's verdict. The fact that plaintiff's credibility was seriously controverted (and was even doubted by the trial judge in an in-chambers conference) further highlights the evidentiary basis for the determination by the jury. This Court's decisions indicate that, where there is an evidentiary basis for the verdict, the jury decision is to be respected. E.g., *Dennis* v. *Denver & Rio Grande Western R.R. Co.*, 375 U.S. 208, 210, 84 S.Ct. 291, ____, 11 L. Ed. 2d 256, 258, (1963); *McBride* v. *Toledo Terminal R.R. Co.*, 354 U.S. 517, 77 S.Ct. 1398, 1 L. Ed. 2d 1534, (1957); *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363, 72 S.Ct. 312, ____, 96 L. Ed. 398, 404, (1952); *Myers* v. *Reading Co.*, 331 U.S. 477, 478, 67 S.Ct. 1334, ____, 91 L. Ed. 1615, 1616, (1947). With an evidentiary basis supporting the jury's verdict in this record, careful scrutiny should be given to the trial judge's grant of a new trial on a non-existent ground entirely waived by respondent.

In this case, the issue must be viewed as whether or not the trial judge can order a new trial on grounds of prejudice not raised in timely fashion where the trial judge has never overturned his earlier finding that the evidence is relevant. As this Court noted in *Lavender* v. *Kurn*, 327 U.S. 645, 654, 66 S.Ct. 740, ____, 90 L. Ed. 916, 923, (1946), rulings on the admissibility of

evidence must normally be left to the sound discretion of the trial judge in FELA cases. In this case, the Illinois Appellate Court assumed that the testimony of Dennis Korando was not admissible for any purpose (Slip opinion at A-7), but that assumption is not at all correct since the trial court very bluntly stated that the question of who brought plaintiff to work on the morning of his injury was relevant to his sleepiness and mental state at the time of the alleged injury. (R. 172G-I) By never reversing himself on the question of admissibility and relevance, the trial judge did nothing less than usurp the jury's findings on the ultimate question of fact when he ordered a new trial.

3. By Failing To Timely Object To Allegedly Prejudicial Testimony, Respondent Waived The Sole Ground For Ordering A New Trial.

Assuming for purposes of argument that Korando's testimony was erroneously admitted, it should be recognized that, in order to preserve an allegation of error in the admission of evidence, specific grounds supporting the objection must be stated and the failure to make such a timely objection, for whatever reason, is sufficient to negate the allegation of error. *Estelle* v. *Williams,* 425 U.S. 501, 509-513, 96 S.Ct. 1691, ____, 48 L. Ed. 2d 126, 134-135, (1976); *Johnson* v. *Bennett,* 395 Ill. 389, ____, 69 N.E.2d 899, 903-904, (1946). Under our adversary system, litigants are bound by the trial judgments of counsel under threat of waiver. *Wainwright* v. *Sykes,* 433 U.S. 72, 91, 97 S.Ct. 2497, ____, 53 L. Ed. 2d 594, 610-611 (1977). The underlying policy behind the requirement of specific and timely objections is the view that the trial judge commits no error unless the proper ground of objection is brought to his attention, and in part upon the possibility that if properly stated, the objection might be corrected or obviated at trial. Clearly, *Handbook on Illinois Evidence,* § 1.12, at 9-10, (1956).

Under Illinois law, if a specific objection is made (as in the instant case where surprise was the ground for respondent's objection in chambers), it is a waiver of all grounds not specified

or, in other words, one ground cannot be urged at trial and another on appeal. *Forest Preserve District* v. *Lehmann,* 388 Ill. 416, ____, 58 N.E.2d 538, 545, (1945). In cases where the grounds for objection may not be apparent until after the evidence has been given, a motion to strike is appropriate and should be promptly made. Cleary & Graham, *Handbook on Illinois Evidence,* § 103.3, at 7-8, (3d ed., 1979). In the instant case, by failing to enter a timely and specific objection to Korando's testimony on grounds of prejudice, respondent should be deemed to have waived the alleged issue. By failing to properly object, and then by raising a specter of racial prejudice in his closing argument, it appears that respondent's counsel made a deliberate tactical decision to accuse the petitioner of racial prejudice in the hope that such an inflammatory issue would appeal to the jurors.

4. The Questions Are Important.

Neither an academic question nor a determination on the question of whether the evidence was sufficient to support the jury verdict is involved herein. The question is whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected. At issue is the Congressional policy that juries determine liability in cases brought under the FELA. As was stated in *Rogers* v. *Missouri Pacific R.R. Co.,* 352 U.S. 500, 510, 77 S.Ct. 443, ____, 1 L. Ed. 2d 493, 502, (1956): "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

The teaching of *Rogers* does not only apply where the plaintiff is complaining of usurpation of the jury function. As Mr. Justice Harlan noted in his dissent in *Harris* v. *Pennsylvania R.R. Co.,* 361 U.S. 15, 27-28, 80 S.Ct. 22, ____, 4 L. Ed. 2d 1, 9, (1959), this Court should frankly announce the intended scope of judicial supervision of jury verdicts in FELA cases and it should give expression to meaningful standards to guide the lower courts in the exercise of their supervisory function.

The instant case falls squarely within the confines of this Court's teaching in *Rogers* and its progeny. A mere review of evidence is not sought — rather, a meaningful enunciation of standards by which the lower courts are to be guided is sought, especially in cases where waiver of alleged errors is present.

CONCLUSION

The issues raised in this petition are fundamental to the functioning of jury trials under the Federal Employers' Liability Act and to the uniformity of judgments secured under that Federal scheme. There is general importance of a recurring nature on the question of whether or not a trial judge may overrule the jury's fact finding by granting a new trial on an issue not preserved in the record and which, in fact, has been created by the respondent's attorney in closing argument. Petitioner does not merely seek correction of what it deems to be a manifest error in the lower court decisions — it seeks an end to the subtle erosion of statutory and judicial principles evolved during the life of the Federal Employers' Liability Act. Petitioner accordingly prays that the Court allow this petition for writ of certiorari.

Respectfully submitted,

JOHN B. GUNN
JAMES CHRISTOPHER COOK
WALKER & WILLIAMS, P. C.
4343 West Main Street
Belleville, IL 62223
618-277-1000

Attorneys for the petitioner,
Alton & Southern Railway Co.,
a corporation.

April, 1981

APPENDIX

APPENDICES

Page

A. Opinion of the Illinois Appellate Court, Fifth District A-1

B. Notice and Order of the Illinois Supreme Court denying Leave to Appeal A-9

C. Order of the Illinois Supreme Court staying Mandate A-12

D. Order of the Circuit Court, Third Judicial Circuit, Madison County, Illinois granting a New Trial on Respondent's Motion A-13

E. Excerpts from the Trial Record A-14

APPENDIX A

No. 78-410

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Ulecious Buchanan,
Plaintiff-Appellee,

v.

Alton & Southern Railway Company, a Corporation,
Defendant-Appellant.

Appeal from the Circuit Court of Madison Count
Honorable William L. Beatty, Judge Presiding.

KASSERMAN, J.

ORDER

(Filed September 19, 1980)

This is an appeal from an order of the Circuit Court of Madison County granting a new trial. Plaintiff, Ulecious Buchanan, brought an action under the Federal Employer's Liability Act (45 U.S.C.A. § 51 *et seq.* (1972)) against Alton & Southern Railway Company for damages arising out of injuries allegedly occasioned by the negligence of defendant. The case was tried before a jury, and a verdict was returned in favor of defendant. Plaintiff filed a post-trial motion which included several assignments of error and sought to have the judgment entered on the verdict vacated and a new trial granted. The trial court granted the motion and ordered a new trial on the sole ground that certain prejudicial and immaterial evidence had been improperly admitted at trial. Pursuant to Supreme Court

Rule 306 (Ill. Rev. Stat. 1979, ch. 110A, par. 306), we granted defendant's petition for leave to appeal from the order granting a new trial.

At trial, plaintiff testified to the following sequence of events. On February 22, 1976, plaintiff drove his automobile to his girlfriend's house in East St. Louis, Ilinois, and then walked four blocks to work, arriving approximately 6:45 a.m. He was employed by defendant and assigned to its railroad yard in East St. Louis. His job classification was that of a hostler's helper, and his duties consisted of servicing locomotives. Servicing included refueling and resanding (engines require sand for braking), replenishing drinking water stored in engine cabs, and removing dirt and debris from the cabs. On this particular morning, plaintiff serviced three Penn Central engines which were coupled together and parked on a maintenance track. After the last cab was serviced, he began to dismount from the engine. To dismount he faced the engine, gripped two steel handrails flanking a series of steps and descended one step at a time. As he neared the last step, his foot slipped and he fell off the engine backwards, striking his back against a roundhouse wall and the ground. He attributed the fall to accumulations of grease and oil which rendered the steps slick. He lay on the ground a few minutes before entering the roundhouse to report his injury to his foreman, Euwald Milkert. Plaintiff complained at trial of pain in his lower back and left leg. He denied being tired or suffering from any physical ailment prior to the accident that morning. He also denied that prior to the accident he was discovered sleeping in the cab of a Norfolk & Western engine by Milkert.

Euwald Milkert, testifying on behalf of defendant, presented a different version of the events which transpired that day. According to Milkert, plaintiff appeared tired and sleepy when reporting to work. Also, plaintiff was unusually loud and made exaggerated movements with his arms. At approximately 9 a.m. Milkert made a search of the yard to locate plaintiff only to

discover him sleeping in the cab of a Norfolk & Western engine. Milkert shook plaintiff by the shoulder to wake him and ordered him off the engine, and plaintiff climbed down without incident. According to Milkert, the two men then walked directly to the locomotive shop, and once inside the shop the plaintiff sat in a chair, at which time he complained to Milkert for the first time about a back problem.

Of particular significance to this case is Dennis Korando's testimony which was received over plaintiff's objection. Korando, a foreman working the shift preceding plaintiff's, testified as follows:

> "Q. [Defense counsel] Where did you see him [plaintiff], for the first time, that morning?
>
> A. At 6:30 a.m., Buck Buchanan entered the roundhouse area, and he said to me, 'Dennis, could you come over here a minute?' I was quite some distance from him, and I walked over to him, and he said, 'Dennis, how about doing me a favor?' He said, 'How about going outside and tell that guy or whoever he is that I have got to work today, and that I can't go with him.'
>
> Q. Um-hum.
>
> A. And I said, 'Okay,' so I walked outside, to the front of the roundhouse area, and there was a 1967 Chrysler [sic], with one individual inside, colored, approximately forty-five years old. Now, I'm not really sure whether it was male or female, to be very honest with you.
>
> Q. Why is that?
>
> A. Well, first of all he had a wig on, a real dark red wig, but in size, he was in excess of 230 pounds, approximately six foot two, six foot three, and I opened up the passenger side door, and I said, 'Buck Buchanan can't go with you today. There's no one to take his place, and he'll have to

stay here. He'll have to work the duration of the shift,' and, at the end of that statement, I looked at him, and he never said a word. I closed the door, and he took off, with no reply from him."

Following a jury verdict in favor of defendant, plaintiff filed a post-trial motion raising several grounds for a new trial. In the order granting the new trial the trial court stated:

"It is the finding of this Court that point 3 of plaintiff's Post-Trial Motion raises a meritorious issue and that the admission into evidence of testimony concerning an alleged 6'4", 230 pound, black individual adorned in a red wig raises a prejudicial and inflammatory inference of black homosexuality. In regard to point 3, plaintiff's Motion for a New Trial is granted."

Defendant contends that the trial court abused its discretion by ordering a new trial on the sole ground that the evidence raised a prejudicial inference of black homosexuality. We disagree.

July decisions cannot be overturned by the granting of a new trial merely because the trial court might have decided differently; rather, a verdict may be set aside only if the trial court is satisifed that the jury was affected by undue prejudice or passion or the verdict is totally unwarranted by the evidence. (*Torrez . Raag* (2d Dist. 1976), 43 Ill.App.3d 779, 357 N.E.2d 632; *Kahn* v. *James Burton Company* (1955), 5 Ill.2d 614, 126 N.E.2d 836.) Whether to allow or refuse a motion for a new trial is left to the sound discretion of the trial court since it observes the witnesses and hears the testimony firsthand, and its decision will not be disturbed by a court of review in the absence of a showing of a clear abuse of discretion. (*Harrison* v. *Chicago Transit Authority* (1st Dist. 1977), 48 Ill.App.3d 564, 363 N.E.2d 11; *Lukich* v. *Angeli* (1st Dist. 1961), 31 Ill.App.2d 20, 175 N.E.2d 796.) Moreover, the trial court is permitted greater latitude in granting a new trial than in denying one. *Torrez* v. *Raag*.

Based upon our examination of the record, particularly the testimony of Dennis Korando, we cannot say that it was a clear abuse of the trial court's discretion to grant a new trial. The specter of black homosexuality with respect to plaintiff, who is black, and the person in the automobile encountered by Korando is readily apparent from Korando's description of that person as a "colored," red-wigged individual whose sex could not be determined. This evidence was not material to the factual issues of this case and only served to prejudice defendant through a racial and sexual innuendo. Therefore, we cannot hold the trial court, which was present and could observe the impact of such testimony, in error for concluding that this testimony had a prejudicial and inflammatory effect on the jury. Thus, it was proper for the trial court to grant a new trial.

Defendant argues in the alternative that it was improper for the trial court to grant a new trial on the basis of an error not objected to. The record shows that plaintiff objected to Korando's testimony only on the basis of surprise. Defendant therefore concludes that plaintiff was precluded from requesting a new trial on the basis of the prejudicial impact Korando's testimony may have had on the jury.

The grounds for an objection should be definitely and plainly stated in all fairness to the trial court and to the opposing party. (*DeMarco* v. *McGill* (1948), 402 Ill. 46, 83 N.E.2d 313.) Where there is no objection or proper preservation of error, the trial court cannot grant a new trial on a later allegation of error. (*Boone* v. *Baker* (1st Dist. 1972), 9 Ill.App.3d 509, 292 N.E.2d 461.) The ramifications of a specific objection which has been overruled are set forth by Wigmore as follows:

> "(2) *Specific Objection.* A specific objection *overruled* will be effective to the extent of the grounds specified, and no further. An objection *overruled,* therefore, naming a ground which is untenable, cannot be availed of because there was *another and tenable ground which might have been named* but was not:

* * *

> Here, also, however (as with a general objection), it would seem that the objection overruled will be effective, though naming an untenable ground, if there is *no purpose at all* for which the evidence could have been admissible * * *." *1 Wigmore on Evidence,* § 18 (3d Ed. 1940).

In the instant case, plaintiff specifically objected to Korando's testimony on the basis of surprise. Ordinarily any objection as to prejudice or other grounds would have been waived. However, the testimony in question is both highly prejudicial and immaterial to any issue in the case. Since no legitimate purpose could have been served by this evidence, the specific objection as to surprise was sufficient to preserve plaintiff's challenge of the sufficiency of the evidence in his motion for a new trial.

Finally, defendant contends that the trial court, by ordering a new trial, usurped the function of the trier of fact in violation of defendant's seventh amendment rights and of the purpose behind the Federal Employer's Liability Act.

Defendant states in its brief:

> "Where there is no unfair prejudice having a direct effect on the verdict of the jury, that verdict should be deferred to in an F.E.L.A. case because the right to a jury determination is part and parcel of the F.E.L.A. remedy. (*Boeing Company* v. *Shipman* (5th Cir. 1969), 411 F.2d 365, 386, 388; *Calabritto* v. *New York, New Haven & Hartford R.R. Company* (2d Cir. 1961), 287 F.2d 394, 395; *Arnold* v. *Panhandle & Santa Fe Railway Company* (1957), 353 U.S. 360, ____, 77 S.Ct. 840, ____, 1 L.Ed.2d 889, 891 (per curiam); *McBride* v. *Toledo Terminal R.R. Company* (1957), 354 U.S. 517, ____, 77 S.Ct. 1398, ____, 1 L.Ed.2d 1534, ____ (per curiam)."

We have already noted that Korando's testimony was highly prejudicial and that the trial court could properly have concluded that such testimony would have directly influenced the jury. Therefore, under the standard enunciated by defendant, the trial court did not improperly invade the province of the jury by ordering a new trial.

Finding that a published opinion in this case would have no precedential value, we affirm the order of the trial court granting a new trial pursuant to Supreme Court Rule 23 (Ill. Rev. Stat. 1979, ch. 110A, par. 23).

AFFIRMED.

HARRISON and SPOMER, JJ., CONCUR.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

January 30, 1981

Mr. John B. Gunn
Attorney at Law
4343 West Main St.
Belleville, IL 62223

No. 54103 Ulecious Buchanan, respondent, vs. Alton & Southern Railway Company, a Corp., petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

UNITED STATES OF AMERICA

State of Illinois }
Supreme Court } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of January in the year of our Lord, one thousand nine hundred and eighty-one, within and for the State of Illinois.

Present: Joseph H. Goldenhersh, Chief Justice

Justice Robert C. Underwood Justice Daniel P. Ward

Justice Howard C. Ryan Justice William G. Clark

Justice Thomas J. Moran Justice Seymour Simon

Tyrone C. Fahner, Attorney General

Louie F. Dean, Marshal

Attest: Clell L. Woods, Clerk

BE IT REMEMBERED, that, to-wit: on the 30th day of January, 1981, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

Ulecious Buchanan,
Respondent

No. 54103 vs.

Alton & Southern Railway Company, a Corporation,
Petitioner

Petition for Leave to Appeal from Appellate Court
Fifth District 78-410, 76 L 560

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this day of , 19

Clerk,

Supreme Court of the State of Illinois.

APPENDIX C

NO. 54103

IN THE SUPREME COURT OF ILLINOIS

Ulecious Buchanan,
Plaintiff-Respondent,

vs.

Alton & Southern Railway Company, a corporation,
Defendant-Petitioner.

Appeal from the Appellate Court, Fifth District No. 78-410,
There on Appeal from Circuit Court, Third Circuit,
Madison County, Illinois, No. 76 L 560

ORDER
(Filed Feb. 18, 1981)

And now on this day, having duly considered the Motion for Stay of Mandate heretofore filed by the petitioner, Alton & Southern Railway Company, and being now fully advised of and concerning the premises, it is ordered that the Mandate in this cause be stayed pursuant to Supreme Court Rule 368(c) pending petitioner's filing of a Petition for Writ of Certiorari in the Supreme Court of the United States.

Enter: February 16, 1981

/s/ Joseph H. Goldenhersh
Chief Justice

APPENDIX D

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

Ulecious Buchanan,
Plaintiff,

v.

Alton & Southern Railway Company, a Corporation
Defendant.

ORDER
(Filed September 18, 1978)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Order of this Court, dated September 1, 1978, granting plaintiff's Motion for a New Trial is vacated.

It is the finding of this Court that point 3 of plaintiff's Post-Trial Motion raises a meritorious issue and that the admission into evidence of testimony concerning an alleged 6'4", 230 pound, black individual adorned in a red wig raises a prejudicial and inflamatory inference of black homosexuality. In regard to point 3, plaintiff's Motion for a New Trial is granted.

IT IS FURTHER found that the remaining points raised in plaintiff's Motion for a New Trial are without merit. With regard to those points, the Motion for a New Trial is denied.

ENTER:

/s/ W. L. Beatty
Judge

DATED: Sept. 10, 1978

APPENDIX E

Excerpts from the Trial Record

(R. 45C)

THE COURT:

I think the sleepy bit can go in. You've told me and the way I read the depositions and everything, you have evidence that this man was asleep, sound asleep just a matter of seconds, 30 seconds before the accident. I think that's admissible and since that is admissible and since he denies that he was asleep then I think as far as his credibility is concerned the fact that he was up until 2:00 in the morning the morning before becomes admissible.

* * *

(R. 53)

RESPONDENT'S ATTORNEY:

What happened after that?

RESPONDENT

After I got through I walked up and I came out the door and turned to the catwalk and prepared to dismount from the engine. I turned around, placed both hands on the handrails and proceeded down the ladder and as I got about the second or third step from the bottom I slipped and fell.

* * *

(R. 223-225)

EUWALD MILKERT:

- and we did come down off of the locomotive. I came off of the locomotive first. For safety's sake, when a person is getting

on a locomotive, he is to face the locomotive, holding on to the handrails, and climbing the steps up, and coming down the rule is the same, that you face the locomotive, hold on to the handrails, and come down backwards.

PETITIONER'S ATTORNEY:

All right, is that the manner that you got off of the locomotive?

EUWALD MILKERT:

That is the manner, in which I got off of the locomotive, and I stood, at the corner of the locomotive, right at the step, waiting for Mr. Buchanan to come down the steps.

PETITIONER'S ATTORNEY:

All right, did you watch him come down the steps?

EUWALD MILKERT:

Yes, I did, sir.

PETITIONER'S ATTORNEY:

And how did he come down the steps?

EUWALD MILKERT:

He came down in the proper manner. He came down holding on to the handrails; he was facing the locomotive, as he should have; and he came down, as he should have.

PETITIONER'S ATTORNEY:

What difficulty, if any, did he have getting down off of that?

EUWALD MILKERT:

He had none.

PETITIONER'S ATTORNEY:

Where did you go, then?

EUWALD MILKERT:

After we were off of the locomotive, we went to the locomotive shop, and we walked into the shop, directly into the shop, and, as you walk through the side door, just a little bit off to the side, there's a small bench and a chair, where the machinist and the hostler - or which they can use to make out their reports, and that is where Mr. Buchanan sat. He sat on that chair. After a short while, he raised his arms up in the air (demonstrating) similar to this, not exactly, perhaps, shrugged his shoulders around a little bit, got up off of the chair, and walked from the west end of the locomotive shop, along "D" track, beside - or between "D" track and the south wall of the shop, walked full length of the locomotive shop, turned around and came back, sat down in the seat again, and just a short time after that, he told me that his back was hurting him.

PETITIONER'S ATTORNEY:

What, if anything, did he tell you about how he had hurt his back?

EUWALD MILKERT:

I asked him how he hurt his back, and he said, 'Getting off of those PC [Penn. Central] units, pointing to the N & W units that we had just gotten off of.

PETITIONER'S ATTORNEY:

All right, and what was your response to that if anything?

EUWALD MILKERT:

I told him that it could not have been PC units, because those were N & W's that we had just gotten off of, and he said,

'Well,' - in effect, he said that doesn't matter, that's where I got hurt.

RESPONDENT'S ATTORNEY:

Excuse me. Your Honor, what he said, in effect, I don't think is -

THE COURT:

Sustained.

* * *

(R. 172A)

In Chambers:

RESPONDENT'S ATTORNEY:

* * * I had just had the opportunity of talking with Mr. Korando and he tells the fairly outrageous story that Mr. Buchanan was dropped off that morning at the railroad yards by a 239 pound, 6 foot 4 redheaded creature, red wigged creature and Mr. Buchanan asked Mr. Korando to tell the creature that he couldn't leave with it. I just think in light of the testimony, the effect that that testimony would have on the jury, I think it's very legitimate to claim surprise and move the witness be precluded from testifying without an opportunity for me to talk to him for a minute or so before he takes the stand. Even without an opportunity to talk to him dispite [sic] the fact that I saw him for a minute or 2, I don't think that's enough, that there is just too much work that would have to be done in light of his testimony, that surprise is an understatement.

* * *

(R. 172B-C)

PETITIONER'S ATTORNEY:

Yesterday in talking to Mr. Kelly and Mr. Milkert last night. I learned about the fact that Mr. Korando had seen the plaintiff. Now, I didn't really attach much significants [sic] to it at that point. So he saw him that morning, no big deal, a lot of people probably saw him and I assumed he drove. You know, he said he drove there. He didn't say he physically drove the car. He could have been a passenger and there again it didn't become an issue until he said he parked his car at his girlfriend's house. Incidently [sic], that's a different car then the one this witness described being there. You're talking about the defendant not revealing the name of a witness, there's an individual that if you believe the foreman has never been disclosed by the plaintiff, you have never named the individual or * * *.

* * *

(R. 172D)

PETITIONER'S ATTORNEY:

* * * I'm talking about how the guy got there and there is a witness that may or may not be produced but it's in direct conflict with what the plaintiff says.

THE COURT:

There's two things that bother me about this. I mean, it looks at least like there is certainly a possibility that your client is lying like a trooper under oath.

* * *

(R. 172D)

PETITIONER'S ATTORNEY:

It makes a lot of difference. Again, it goes to the credibility of a plaintiff in anything that he does. If he's going to testify as a

witness in his own behalf as to what happened to him, his ability at the time, his sences [sic] at the time, all of these things reflect on his credibility to respond to that question and say what he was doing. If this guy gets on the stand and gives the greatest story in the world and gives it minute detail, if he can show he was dead drunk at the time that reflects on the credibility of his story if he's drunk, how he can remember. If he's dead tired how can he remember all the things? It goes to his physical condition just before this accident happened.

* * *

(R. 172E)

THE COURT:

You're saying your client can lie under oath and take advantage of it.

* * *

(R. 172F)

THE COURT:

I mean, there's only so much lying that you can tolerate in one case, gentlemen. I mean, let's face it, if the guy is sitting there not telling the truth why the hell should he be given any advantage.

* * *

(R. 172G-H)

THE COURT:

It seems to me that while the question of how he got to work or who brought him to work may not under ordinary circumstances be relevant or material, that we have a situation here where there is a complete conflict from the start to finish in the

entire story of the plaintiff's and the defendant's witnesses. The defendant's witnesses say that moments before the accident the man was sound asleep. He says he wasn't asleep and was alert. So, that means that means, as I analyze it, it means that the defendant then is entitled to produce evidence to show that he was asleep because certainly if he was asleep there may be, you know, contributary [sic] negligence to falling down the steps if he did fall. They say he didn't fall. In showing that he was asleep we get in the question of where he was that night, what time he went to bed and so we come up with another complete conflict. He says he drove to work, left the car at his girlfriend's house and walked 4 blocks, and there's a witness who said he didn't. You know, I think, as I said off the record, there is just so much stuff that you can sweep under the rug and after a while you have to let some of it come out. I'm going to let him testify. Now, as far as notice or anything like that, Mr. Gunn has represented to the court that he was not aware of this until yesterday and did not know all the details of it until this morning when the plaintiff testified and when just at recess he talked to this man. I don't think there is any, you know, he hasn't been withholding anything. If you want additional time to talk to him.

* * *

(R. 172I)

THE COURT:

If he's running around with a fag with a red haired wig on and how much sleep he has. May be the IPI instructions 105 or 104, by using common sence [sic], applies to judges as well as jurors. And I think this is certainly significant to me. Obviously someone is lying here. I don't know if it's your client, maybe these people, maybe they're lying, but that's what we have a jury to decide. It's not up to me to decide who is lying.

* * *

(R. 192)

DENNIS KORANDO:

At 6:30 a.m., Buck Buchanan entered the roundhouse area, and he said to me, "Dennis, could you come over here a minute?" I was quite some distance from him, and I walked over to him, and he said, "Dennis, how about doing me a favor?" He said, "How about going outside and tell that guy or whoever he is that I have got to work today, and that I can't go with him."

* * *

And I said, "Okay," so I walked outside, to the front of the roundhouse area, and there was a 1967 Chrysler, with one individual inside, colored, approximately forty-five years old. Now, I'm not really sure whether it was male or female, to be honest with you.

* * *

(R. 193)

DENNIS KORANDO:

Well, first of all he had a wig on, a real dark red wig, but in size, he was in excess of 230 pounds, approximately six foot two, six foot three, and I opened up the pasenger side door, and I said, "Buck Buchanan can't go with you today. There's no one to take his place, and he'll have to stay here. He'll have to work the duration of the shift," and, at the end of that statement, I looked at him, and he never said a word. I closed the door, and he took off, with no reply from him.

* * *

RESPONDENT'S ATTORNEY'S CLOSING ARGUMENT

(R. 364-365)

He knows that he fell, through no fault of his own, and there's no proof to the contrary, that he was not on a Penn Central. They tried that today. Mr. Martin came in, and said that he wasn't but Mr. Milkert came in and said contrary; he was on those cars, and I think there's a final issue, and I don't think, as I indicated, here I haven't tried as many law suits, as Mr. Gunn, but the fact that he brought in this Mr. Korando guy, to talk about this red headed creature, who was out on the parking lot, the day of this incident; now, what that had to do with Mr. Buchanan's falling, later in the day, totally escapes me. He brings in this Mr. Korando, who says he saw Mr. Buchanan, at 6:30, and then goes out, and there's this six foot three or six foot four, two hundred and thirty pound black, and he doesn't know if it's man, doesn't know if its male, with a red wig on. Now what - so what? I mean, I'm not sure, really, what kind of effect that was supposed to have on you, as tryers [sic] of the facts in this case, but I can only characterize it as a cheap shot. I don't think it's fair, to come in here and - tarring this man up, really, for no particular reason, and talking about this creature, with the red wig, has nothing to do with anything, in the issues of this law suit. This is a law suit. It's not a carnival. You've got to bring in information, that's relevant to the law suit. That's no more relevant than other injuries are, on this railroad yard. You can't talk about stuff like that.

* * *

(R. 368)

I think you can also consider just the whole relevancy of some of that evidence. I suppose I can't take personal offense, but I'm actually appalled, by the idea of this black thing with the wig, coming into this case; it's got nothing to do with anything. So you can consider, I think, the relevancy and discrepancy of

what was brought into this case. So, that's sort of the evidence, I suppose lack of evidence, the non-issues, that the railroad has produced here.

* * *

(R. 371-372)

He's never had any problem, and I can tell you this, that it seems to me that a railroad that can go find and drag somebody out of the woodwork, that's got a red wig on, can sure go and find out if this guy had job problems, and he didn't * * * [B]ut we're not dealing here, with a shiftless fellow or some black who's trying to take advantage of the system.

* * *

(R. 373)

Now, I think Mr. Buchanan realizes that it's, unfortunately, a white man's world, and his really only opportunity, a black, with a high school education, is to work and to work hard. Now, I'm not - I'm not trying to convert this into a civil rights law suit. I mean, there are always prejudices and always problems.

* * *

(R. 373)

I'm not from here, originally, is that [sic] there was a time, here in Granite City, when whites didn't come past 6th Street. You know, if you wanted the white kind of life, you couldn't come past 6th Street, and that kind of ____.

* * *

PETITIONER'S ATTORNEY'S CLOSING ARGUMENT:

(R. 392-393)

Now, one of the first things the court is going to instruct you on is that you don't base your verdict, that you finally decide, on any sympathy or prejudice, of any kind. Now, there's been a great deal of conversation about the fact that this plaintiff, in this case, is black. That's not an issue, in this law suit, to anything. It has been raised by the plaintiff. I haven't said anything about. I didn't question anybody about it on vior dire, and, as far as any kind of prejudice is concerned, I know, and we all know, that I don't imagine there's probably a worse defendant, as far as prejudice is concerned to come in and represent, than a railroad, because nobody likes railroads. They block people, at crossings; they make people unhappy. There's a lot of problems with that, so, if you want to talk about a natural prejudice, and I don't expect people - to be able to find twelve people, frankly, that are gonna get on a jury and not have any kind of grudge against the railroad; that's almost impossible, but what I do ask is that when you consider what you're gonna do, to try and leave that fact out and weigh the evidence that you heard. Talk about the evidence and the facts, the photographs, the documents. That's the kind of thing you're to base your evidence on, not speculation and conjecture, not guesswork and that type of thing. * * * You'll be told that you are the sole judges of a witness is telling you the truth or not. I don't decide it. The plaintiff's attorney doesn't decide that. You decide it, the twelve of you, * * *.

* * *

(R. 406-407)

He says that when he got there, for instance, that he parked his car at his girlfriend's house and walked four blocks to work. Now, it just so happens that we have the prior shift foreman, that just happened to see him, and Buchanan, at least by his

own story, says, 'Do me a favor and go out there and tell that guy that I can't go with him.' Now, I don't know who that guy was, and I'm not about to go looking for him, but I'll tell you one thing; to dream up a story like that is a pretty good one. I don't think I could to that well, if I tried to make it up, and I don't think any of the railroad workers could make up one like that. This guy is just another foreman, and, certainly, he might remember something like that, as it is just a little out of the ordinary, and, so, who that person was, we've never been told. The plaintiff has never told us about that. He's never denied it. He's never got on the stand and denied that that happened, and that could be a possible witness, as to where the plaintiff was, in those preceding four hours, that he says he was in bed. I don't know, and we get into that area of why I think it's important, in the case, and it's a real issue, in his contributory negligence, in the case. If he is dead tired, I think it's important to show, if he was up all night, or not up all night, or how little sleep he had. That's important for the defense to show that he doesn't have all of his faculties that morning, because of that, because of the drowsiness, and the fact that all of these people, who saw him, said that he was acting a little strange, when he reported there, that he was a little loud. He is a quiet fellow, apparently. He certainly hasn't made any noise, in this law suit, and he has testified quietly, and that, I guess, is his nature.

* * *

(R. 421)

As far as any of the evidence, again, getting back to the red wig thing, I can't help it that plaintiff's counsel doesn't think it's relevant. That is not my problem, but I can only say to you that we played by the rules, in this court, and, if it wasn't relevant, in some fashion, it wouldn't be in front of you, as a piece of evidence at all, to consider. So, there has to be some relvancy to it, and what relevancy is for you to decide. If it doesn't mean anything to you, fine, but I can tell you that the railroad certainly

didn't plant that individual out there that morning, just so we'd have this story two years later. I think that's a little ridiculous and incredible.

RESPONDENT'S ATTORNEY'S REBUTTAL ARGUMENT:

(R. 422-423)

One, I don't think I overemphasized that my client happens to be a black man. I think I would have been pretty remiss, if I hadn't talked to you about it, at the very beginning on the voir dire and so on. I think it's unfortunately a part of human nature, and I'm sure that Mr. Gunn has a lot of problems, in representing the railroad, and that it's a very difficult position and so on, but, nevertheless, I just wanted to bring out early-on that we are dealing with a black man, and that could have an effect on some people, and I trust, and we picked this group, and I don't think it will, in this case. I think we're dealing with fair minded and level headed people.

80-1772

NO. 80-

Office-Supreme Court
FILED
MAY 21 198
ALEXANDER L. ST
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY
A CORPORATION,

Petitioner,

vs.

ULECIOUS BUCHANAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

MORRIS B. CHAPMAN
ROBERT W. BOSSLET, JR.
CHAPMAN AND CARLSON
1406 Niedringhaus
Granite City, IL 62040
(618) 876-8440

Attorneys for Respondent

May, 1981

QUESTIONS PRESENTED

Whether the trial court abused its broad discretion in granting Plaintiff a new trial in this cause, and whether the unanimous Appellate Court of Illinois, Fifth District and the Supreme Court of Illinois erred in affirming said new trial.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents.	ii
Table of Authorities	iii
Reason for Denying the Writ of Certiorari	2
1. The Trial Court Did Not Abuse Its Broad Discretion in granting Plaintiff A New Trial As Unanimously Affirmed By The Illinois Appellate Court, Fifth District and the Supreme Court of Illinois.	2
Conclusion.	25

TABLE OF AUTHORITIES

Cases	Page
Heaver vs. Ward, 68 Ill.App.3d 236, 24 Ill.Dec. 930, 386 N.E.2d 134, 139 (2d Dist., 1979)	21
Johnson vs. Bennett, 395 Ill.389 at _____, 69 N.E.2d 899 at 903 (1946)	15
Kavanaugh vs. Washburn, 387 Ill.204, _____, 56 N.E.2d 420, 423 (1944)	3,13
Keen vs. Davis, 108 Ill.App.2d 55, 246 N.E.2d 467 (5th Dist., 1969)	4,5
Klatt vs. Commonwealth Edison Company, 33 Ill.2d 41, 211 N.E.2d 720, 727 (1965)	6
Magnani vs. Trogi, 70 Ill.App.2d 216, _____, 218 N.E.2d 21, 23-24 (2d Dist., 1966)	11
Manninger vs. Chicago and Northwestern Transportation Company, 6 Ill.App.3d 719 (5th Dist., 1978)	20

McBride vs. Toledo Terminal Railroad Company, 354 U.S. 517, 518-519, 77 S.Ct. 1398-1399, 1 L.Ed.2d 1534 (1957) 24

Mitchell vs. Sims, 62 Ill.App.3d 514 at _____, 19 Ill.Dec. 600 at _____, 379 N.E.2d 115 at 116 (1st Dist., 5th Div., 1978) 12

Roehrig vs. Dept. of Public Works, 45 Ill.App.3d 189, 3 Ill.Dec. 893, 359 N.E.2d 752 at 760 (5th Dist., 1977) 13

Rogers vs. Missouri Pacific Railroad Co., 352 U.S. 500, 510, 77 S.Ct. 443, _____, 1 L.Ed.2d 493, 502 (1956) 17

Torrez vs. Raag, 43 Ill.App.3d 779, 2 Ill.Dec. 465, 357 N.E.2d 632 at 635 (2d Dist., 2d Div., 1976) 18,19

Statutes

28 U.S.C. Section 17 2,3

Illinois Supreme Court Rule 306, Illinois Revised Statutes, Chapter 110(a), Section 306 12

Supreme Court Rule 315, Illinois Revised Statutes, Chapter 110(a), Section 315 12

Miscellaneous

Hunter's Trial Handbook, Section 33:12 15

1 Wigmore on Evidence, Section 18 (3d Ed. 1940) 15

NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY,
A CORPORATION,

Petitioner,

vs.

ULECIOUS BUCHANAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT

REASON FOR DENYING THE WRIT OF CERTIORARI

THE TRIAL COURT DID NOT ABUSE ITS BROAD DISCRETION IN GRANTING PLAINTIFF A NEW TRIAL AS UNANIMOUSLY AFFIRMED BY THE ILLINOIS APPELLATE COURT, FIFTH DISTRICT AND THE SUPREME COURT OF ILLINOIS

United States Supreme Court Rule 17, 28 U.S.C.A. lists the "Considerations governing Writ of Certiorari" considered by the Supreme Court in determining whether to grant a Petition for a Writ of Certiorari.

While Respondent does not intend to demean the Petition filed herein, it must be noted that the issue before this Court is hardly one of first impression. The Appellate Court of Illinois, Fifth District, was not overwhelmed by the "issues" raised below as evidenced by its "Finding that a published opinion in this case would have no precedential value... ." (A8)

Indeed it is not entirely clear that the Illinois Appellate Court's affirmance of the trial court's granting of a new trial was properly before the State Supreme Court much less the Supreme Court of the United States.

Kavanaugh vs. Washburn, 387 Ill.204, ___, 56 N.E.2d 420, 423 (1944) held that no authority warranted the right of a party to appeal to the State Supreme Court "...from an Order of the Appellate Court entered in that court on a review of an order granting a new trial." For this reason alone, Respondent would be remiss if he did not move that the Petition for Writ of Certiorari filed herein be dismissed.

Allowing without admitting the jurisdiction of this Court, Respondent submits that there is no "...special and important reason..." (U.S.Sup.Ct. Rule 17, 28 U.S.C.A.) for granting the Writ requested by Petitioner. The Petition should be denied.

The trial judge's exercise of discretion in granting a new trial after the admission of prejudicial testimony is a discretionary determination to which the reviewing court should defer since the trial judge is in a better position to observe the prejudicial testimony and its effect on the jury. This case presents no exception to that well-settled precept, nor is there any record of any abause of the trial judge's discretion which is the only basis for upsetting the granting of a new trial. It is equally well settled that ordinarily an Appellate Court will not review

an order granting a new trial unless there is a showing that the trial court clearly and palpably abused its discretion. Therein lies the sole issue before this court as determined by the Illinois Appellate Court, Fifth District (Appendix A to Petition, Order of the Court page 8) and approved by the Illinois Supreme Court.

As set out in **Keen vs. Davis,** 108 Ill.App.2d 55, 245 N.E.2d 467 (5th Dist., 1969), relied upon by Petitioner below but abandoned herein, in reviewing whether the trial court is justified in granting a new trial, the reviewing court's inquiry is limited to whether the trial court's action was an abuse of discretion. The court in **Keen** provides a definition of abuse of discretion by citing

> ...**Peek vs. United States,** 9 Cir., 321 F.2d 934, where quoting from **Delno vs. Market St., Ry. Co.,** 124 F.2d 965, the United States Court of Appeals for the Ninth Circuit, at page 942, said that discretionary judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only when no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken

> by the trial court, then it cannot be said that the trial court abused its discretion."
>
> 246 N.E.2d at 471.

It can hardly honestly be asserted in this case that, "...no reasonable man would take the view adopted by the trial court." Quite obviously "...reasonable men could [and in this case do] differ as to the propriety of the action taken by the trial court..."; therefore "...it cannot be said that the trial court abused its discretion."

In applying the definition of abuse herein cited, the **Keen** opinion concludes:

> Applying this definition although we do not agree with the trial court that the evidentiary situation presented required the granting of a new trial, we are governed by **Dept. of Public Works & Bldgs. vs. Russell**, 28 Ill.2d 491, 192 N.E.2d 900, wherein the Supreme Court said at page 496, 129 N.E.2d at page 903: "The issue, as we have suggested, is not whether we would set aside the verdicts upon the record before us. It is rather whether the record shows that the trial judge abused his discretion in granting a new trial," and we are unable to say that the trial court, in granting defendants a new

> trial, abused its discretion. Id.

It must finally be noted that **Keen** affirmed the trial court's granting of a new trial as did the Fifth Judicial District and the Supreme Court of Illinois in the case before this Honorable Court.

Klatt vs. Commonwealth Edison Company, 33 Ill.2d 41, 211 N.E.2d 720 (1965) held the Appellate Court erred in reversing the trial court's order granting a new trial; the reversed Appellate opinion was relied upon by Petitioner below but abandoned herein. In reversing the Appellate Court, the Illinois Supreme Court said:

> Moreover, it must be remembered that the trial court, in reaching a determination to award a new trial, is vested with discretion, and absent a clear abuse thereof, its decision should not be disturbed on appeal (**Dept. of Public Works & Bldgs. vs. Russell,** 28 Ill.2d 491, 192 N.E.2d 900; **In re Estate of Velie,** 318 Ill.App. 550, 48 N.E.2d 431.) We therefore hold that the Appellate Court erred in reversing the trial court's order of granting defendants a new trial.
>
> 211 N.E.2d at 727.

Defendant-Petitioner suggests to this Honorable Court that the large, black, be-

wigged individual in question was "... the person believed by Petitioner to have brought Respondent to work shortly before," (Petition for a Writ of Certiorari, page 8). Unfortunately no specific line of questioning to support said "belief" was ever pursued by defense counsel. Even more unfortunately, the more obvious belief to be drawn from the testimony of Defendant's surprise witness is that Mr. Buchanan was involved in somewhat seamy relationships with rather unsavory characters. Said inference was noted by defense counsel: "Now we have a red-headed fag driving him to work." (R 172 E) It was also clear to the court: "If he's running around with a fag with a red-haired wig on..." (R 172 I).

Defendant cannot deny its knowledge of the prejudicial impact this wholly unrelated testimony would have on the jury: "Mr. Gunn: 'I didn't know about the red-haired wig part or know the strange impact of his testimony until I talked with him.'" (R 172 H).

It was quite clear to the trial judge, and to the three Appellate Judges who affirmed his decision, and evidently to the Illinois Supreme Court that the damaging inference raised by Mr. Korando did not deal with how

Plaintiff got to work on the morning in question, but only acted to raise the inescapable inference of black homosexuality. Moreover the comments of counsel for the Plaintiff and the Defendant and the comments of the trial judge as noted herein belie Defendant's contention both here and at the State Appellate levels "...that the suggested inference of black homosexuality...was solely a figment of the imagination of Respondent's attorney..." (Petition, page 9).

The concern of Plaintiff's counsel with the irrelevance and prejudice of the proposed testimony was articulated to defense counsel and the court: "It doesn't give you the right to cloud this thing and drag it out in front of a jury." (R 172 E). Plaintiff's counsel also expressed concern with "...the effect that the testimony would have on the jury... ." (R 172 A). While the particular adjective "prejudicial" may not have been articulated to describe the "effect" which concerned Plaintiff's counsel, the thrust of the objection in context with the circumstances surrounding it is quite obvious.

Upon assurance by defense counsel that the testimony of Mr. Korando would explain Plaintiff's arriving at work in a fashion other than that testified to by Plaintiff

thereby impeaching him, the court allowed the Defendant to call Mr. Korando who was an undisclosed witness until called to the stand (R 172 H). Defense counsel expressly advised the court: "...I'm talking about how the guy got there and there is a witness that may not be produced but it is in direct conflict with what the Plaintiff says." (R 172 D). "Mr. Gunn: '...I found out yesterday that this foreman saw him arrive at work and there was somebody in the car that led him out.'" (R 172 G) No such testimony, however, was presented.

Based on the express representations of defense counsel, the court concludes that: "It seems to me that while the question of how he got to work or who brought him to work may not under ordinary circumstances be relevant or material, that we have a situation here where there is a complete conflict..." (R 172 G) As already discussed, however, the record is totally void of any testimony or reference to the alleged conflict concerning Plaintiff's arrival at work.

Respondent is not suggesting that Defendant intentionally misled the court. It is clear, however, to this writer, and evidentaly to the trial judge, and the Appellate Court, and the Illinois Supreme Court that

the only testimony developed from Defendant's last-minute witness was wholly irrelevant and unfairly prejudicial. Reference, in defense counsel's own words, to "...this thing in the car..." (R 172 B) with no testimony concerning Plaintiff's means of arriving at work on the date in question or activities of the preceding evening was prejudice which far outweighed the very nominal probative value, if any, of that testimony elicited from Mr. Korando. At no time was there any mention that the "...red-headed fag..." (R 172 E) drove Plaintiff to work on the morning in question or was with Plaintiff during the evening before.

The unfair and extremely prejudicial implications of the testimony elicited from Mr. Korando became evident to the court only after putting the entire testimony into perspective, and quite clearly justifies the granting of a new trial in this cause.

> The purpose of vesting the trial judge with power to grant a new trial is to permit him, before losing jurisdiction of the case, to correct errors that he or the jury might have made during the course of the trial. Courts of review have repeatedly stated that they will not disturb the decision of a trial court on a motion

> for a new trial unless a clear abuse of discretion is affirmatively shown. The reason for this rule is that the trial court has had the opportunity to consider the conduct of the trial as a whole, and therefore is in a superior position to consider the effects of errors which occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished. **Duff vs. Ewing,** 65 Ill.App.2d 382, 208 N.E.2d 320. Greater latitude is allowed a trial court in granting a new trial than in denying a new trial. **Hollis vs. Mateika,** 65 Ill.App.2d 267, 213 N.E.2d 409.
>
> **Magnani vs. Trogi,** 70 Ill.App.2d 216, _____, 218 N.E.2d 21, 23-24 (2d Dist., 1966), cited at page 5 of the Order of the Appellate Court of Illinois, (A-5).

It hardly can be honestly claimed that "a clear abuse of discretion" has been shown in this cause. The case at bar is no exception to the well-settled law in this regard, and the circumstances quite clearly justify the trial judge's final decision. It is difficult enough for a large, black man seeking money damages to prevail in Madison County, Illinois without interjecting the additional inescapable bias developed as a

result of Mr. Korando's wholly irrelevant testimony.

A recent case which seems to accurately summarize the law and issues regarding the granting of a new trial and the expected Petition for Leave to Appeal is **Mitchell vs. Sims**, 62 Ill.App.3d 514 at ____, 19 Ill.Dec. 600 at ____, 379 N.E.2d 115 at 116 (1st Dist., 5th Div., 1978):

> It is a well-established rule that the decision to grant a new trial is an exercise of the trial court's discretion which should not be reversed on appeal unless a clear abuse of discretion is shown. (**Ervin vs. Sears, Roebuck & Co.** (1976), 65 Ill.App.2d 140, 2 Ill.Dec. 333, 357 N.E.2d 500; **Klatt vs. Commonwealth Edison** (1965) 33 Ill.2d 481, 211 N.E.2d 720) ...Most importantly for the purposes of this appeal, it is clear that the trial court's order granting a new trial will only be disturbed when the alleged abuse of discretion is affirmatively shown in the record. (Citing cases)

No such affirmative showing appears in this record, and the teaching of the court relative to an Illinois Supreme Court Rule 306 Petition applied *a fortiori* to a Supreme Court Rule 315 Petition which was denied

in this case, presuming such a Petition is proper where the Appellate Court has affirmed the trial court's granting a new trial. (**Kavanaugh vs. Washburn, supra.**)

The law concerning the wide latitude afforded the trial judge in granting or denying a new trial is too rudimentary to be challenged. The axiomatic law as applied to the facts of this case demonstrates that the trial judge in no way abused the broad discretion afforded him in determining whether or not to grant a new trial.

Concededly no in-court objection was raised to testimony which Plaintiff knew would be allowed despite his protestations before the jury. A party is not obligated to highlight prejudicial testimony by objecting to it, especially when the party knows in advance that objections will be overruled. It has been recognized that, in the minds of the jury, objections may only act to emphasize prejudicial material. See, for example, **Roehrig vs. Dept. of Public Works,** 45 Ill.App.3d 189, 3 Ill.Dec. 893, 359 N.E.2d 752 at 760 (5th Dist., 1977) where, in discussing the purpose of moving for a Motion in Limine, the court recognizes that such a motion "...is an implicit state-

ment that the movant believes he will suffer prejudice if he has to object to the evidence before the jury."

The prejudicial remarks elicited were calculated to and did have their intended detrimental effect. Objection would only have accentuated that effect which was further exploited by Defendant in suggesting to the jury that the prejudicial testimony was somehow condoned by the court:

> Mr. Gunn: ...I can only say to you that we play by the rules, in this court, and, if it wasn't relevant, in some fashion, it wouldn't be in front of you, as a piece of evidence to consider. So, there has to be some relevancy to it, and what relevancy is for you to decide. (R 421)

Defendant would have the court believe that Plaintiff stood mute while the tendered testimony was being discussed in chambers. To the contrary, however, Plaintiff on several occasions objected to the testimony of Mr. Korando on the bases of surprise and irrelevance which cannot be detached from the inherent objection of prejudice, in that any evidence must have its prejudicial effect weighed against its probative value, if any. At any rate, Plaintiff's objections were all

to no avail since the court was led to believe that Defendant would tie in the evidence which the court would find "...not under ordinary circumstances [to] be relevant or material..." (R 172 G). As has already been set out herein, no such "tie-in" was accomplished, aside from interjecting inflammatory innuendos.

As noted in **Johnson vs. Bennett**, 395 Ill.389 at ____, 69 N.E.2d 899 at 903 (1946), a will contest cited by Defendant at page 11 of its Petition,

> ...a specific objection to the admission of evidence is unnecessary where it is manifest that the offered proof has no probative value whatever.

This well-settled proposition is succinctly reiterated in Hunter's **Trial Handbook** at Section 33:12, page 320:

> ...evidence which will only serve to prejudice the minds of the jury is properly excluded. In weighing the tendency to produce passion and prejudice out of proportion to its probative value, the matter is largely within the sound discretion of the trial court. 29 **Am.Jur.2d**, Evidence Section 260.

See also **1 Wigmore on Evidence**, Section

18 (3d Ed. 1940) cited at pages 6 through 7 of the Order of the Appellate Court of Illinois. (A 6-7)

The prejudicial effect and irrelevance of the proferred testimony was repeatedly expressed to the court in chambers (R 172 A, 172 E, 172 I) but unfortunately was not properly ruled upon until the wholly irrelevant and prejudicial testimony had taken its toll. Thus without going into any allegedly "impeaching" testimony, Defendant presented to the jury Mr. Korando's testimony concerning

> ...one individual...colored, approximately forty-five years old. Now, I'm not really sure whether it was male or female, to be very honest with you...he had a wig on, a real dark red wig, but in size he was in excess of 230 pounds, approximately six foot two, six foot three... (R 192-193).

In relation to Mr. Buchanan, Mr. Korando allegedly observed

> ...his eyes were extremely red, and I could tell, with what he said to me, he really extremely overemphasized, you know, his feelings. (R 194)

Mr. Korando finally warned Mr. Buchanan's foreman:

> "You may have some trouble with him, I don't know." I just said, "You may have some trouble with him." I didn't get specific. (R 194)

None of the foregoing had any bearing on any legitimate issue at trial. More importantly the demeanor of the witness and the impact of his testimony on the jury cannot be accurately conveyed in writing but were available to be observed by the trial judge.

It might also be noted that the trial judge who heard this cause was hardly an inexperienced novice. Then Illinois Circuit Judge William L. Beatty, now District Judge Beatty for the U. S. District Court, Southern District of Illinois, is a seasoned trial judge who had the benefit of considerable trial experience as an attorney before assuming his responsibilities on the bench.

It is patently unfair to even suggest that the Honorable Judge Beatty would "...persistently deprive litigants of their right to a jury determination." (Petition, page 12, citing **Rogers vs. Missouri Pacific Railroad Co.**, 352 U.S. 500, 510, 77 S.Ct. 443, ____, 1 L.Ed.2d 493, 502 (1956)) While Plaintiff-Respondent certainly agrees that persistent deprivation of the right to trial

by jury warrants the intervention of the Supreme Court of the United States, the circumstances of this case do not justify imposing upon this Honorable Court.

The impact of the testimony in question was ultimately noted by the trial judge and handily disposed of by the Appellate Court: "However, the testimony in question is both highly prejudicial and immaterial to any issue in the case." (Appellate Court Order, page 7, A-7) The opinion of the Appellate Court, as affirmed by the State Supreme Court, is in stark contrast to Petitioner's convenient characterization of the comments in question as "entirely harmless." (Petition, page 8)

Defendant seems to suggest that a party is somehow required to move for mistrial in order that grounds for a new trial be properly preserved. No such requirement, however, is imposed upon any party, and Defendant does not cite the Court to any rule of procedure or case law so stating.

In **Torrez vs. Raag**, 43 Ill.App.3d 779, 2 Ill.Dec. 465, 357 N.E.2d 632 at 635 (2nd Dist., 2d Div., 1976) cited by the Illinois Appellate Court at page 5 of its Order (A-7), the court dealt with failure

to move for a mistrial as follows:

> We do not feel the plaintiff's failure to move for a mistrial renders her unable to cite the prejudicial remark as a ground for a new trial. In ruling on the motion for a new trial, the court found this remark to have had a prejudicial effect on the jury. The trial court is in a better position than the reviewing court to determine the prejudicial effect, if any, of a remark made during argument, and unless clearly an abuse of discretion, its ruling should be upheld. **Elizer vs. Louisville N.R. Co.** (1970) 128 Ill.App.2d 249, 254, 261 N.E.2d 827; **Chicago vs. Chicago Title and Trust Company,** 331 Ill.322, 163 N.E.2d 17.

The ultimate issue in **Torrez** was the trial court's granting Plaintiff a new trial in a medical malpractice case after a verdict in favor of the Defendant physician. The Appellate Court held that the trial court did not abuse its discretion in ordering a new trial; the court concludes:

> ...and we therefore do not find that the court abused its discretion in ordering a new trial since there was a showing that the verdict, though perhaps not wholly

> unwarranted by the evidence, resulted from passion or prejudice. We therefore affirm the order of the trial court granting a new trial of this cause.
> Id.

The same sound reasoning applies to the facts of this case as unanimously held by the Appellate Court, Fifth District, and affirmed by the Illinois Supreme Court.

Aside from the fact that timely and proper objections were made by the Plaintiff in this cause, the Appellate Court

> "...may consider...assignment of error even though no objection was made and no ruling was made or preserved thereupon by court or counsel. (**Belfield vs. Coop** (1956), 8 Ill.2d 293, 311-313, 134 N.E.2d 249, 259; **Paulsen vs. Gateway Transportation Company** (2d Dist., 1969), 114 Ill.App.2d 241, 252 N.E.2d 406.)"

> **Manninger vs. Chicago and Northwestern Transportation Company**, 6 Ill.App.3d 719 (5th Dist., 1978).

In **Manninger** the court specifically noted that counsel wholly failed to object to many of the statements urged as grounds for reversal.

It must finally be noted that a party seeking a new trial is not put to the in-

surmountable burden that Petitioner would lead this Court to believe Plaintiff must somehow sustain. **Heaver vs. Ward,** 68 Ill.App.3d 236, 24 Ill.Dec. 930, 386 N.E.2d 134 (2d Dist., 1979) was a suit which arose out of an automobile accident. The Circuit Court entered judgment on the verdict in favor of Defendant. Thereafter Plaintiff moved for a mistrial, alleging that the verdict was based, at least in part, on consideration of materials not properly admitted in evidence. Plaintiff's motion was denied, and Plaintiff appealed. The Appellate Court, Guild, P.J. held, inter alia, as follows:

> Neither the trial court nor this court need attempt to delve into the exact effect of unauthorized evidence on a particular juror. ... It is enough that the unauthorized evidence directly relates to issues in the case and may have improperly influenced the verdict. In **Gertz vs. Bass** (1965) 59 Ill.App.2d 180, 185-86, 208 N.E.2d 113, 116, the First District Court of Appeals quoting **Daniels vs. Barker** (1938), 89 N.H. 416, 200 A. 410 reasoned as follows:
>
> "When incompetent evidence which may be prejudicial is received, the verdict is set aside, without proof that

> the jury gave it any weight in reaching the verdict. To require the losing party to prove actual prejudice would place a difficult and unjust burden on him... ."

386 N.E.2d at 139.

The trial judge in this cause, admittedly after the fact, exercised the opportunity afforded him to correct the damage which had already occurred by the submission of improper evidence. This decision of the trial judge was unanimously affirmed by the State Appellate Court and the Illinois Supreme Court. This Honorable Court need not burden itself by entertaining further and needless presentation of this now thrice argued issue.

Finally the opinions of Mr. Justice Frankfurter relative to the granting of Writs of Certiorari in FELA cases must be heeded:

> Mr. Justice FRANKFURTER, dissenting.
>
> In Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 524, 77 S.Ct. 443, I gave my reasons for deeming it an abuse of the Court's discretionary certiorari jurisdiction to make cases arising under the Federal Employers'

Liability Act, 45 U.S.C.A. Section 51 et seq., a class exception to the Court's principle against granting certiorari when all that is involved is the evaluation of evidence. * * *

Congress saw fit to give the state courts jurisdiction of the rights it created by the Federal Employers' Liability Act. Presumably, it had confidence in the state courts for enforcement of these rights. * * * It left adjudications brought in the state courts with the state courts, except in instances applicable generally to the jurisdiction on writ of certiorari, to be exercised, that is, "only where there are special and important reasons therefor." Rule 19 of the Revised Rules of this Court, 28 U.S.C.A.

It cannot be too often repeated. This Court has said again and again that a difference of opinion in weighing evidence is not included among "special and important reasons" for granting certiorari. * * * And so the nine members of the highest tribunal in the land, preoccupied with more than enough cases involving the gravest issues of national importance, are asked to take on the task of making

> an independent study of the record below...the four opinions below, and the briefs of parties, after three courts and ten judges of Ohio have conscientiously dealt with questions that are not specialized questions of federal law and indeed constitute probably the most recurring staple business of the courts throughout the country.
>
> I must respectfully decline to assume this task.
>
> **McBride vs. Toledo Terminal Railroad Company,** Dissent of Mr. Justice Frankfurter, 354 U.S. 517, 518-519, 77 S.Ct. 1398-1399, 1 L.Ed.2d 1534 (1957)

Plaintiff must conclude by expressing wholehearted concurrence with Petitioner's concern with the rights of all parties to a jury determination in an FELA case. The jury's determination, however, must be based upon proper evidence and not prejudicial irrelevancies; Plaintiff merely seeks such a determination. To suggest, as does Defendant in its conclusion, that the granting of a new trial somehow deprives any party of its right to a trial is not accurate. Both Plaintiff and De-

fendant are entitled to a jury determination in an FELA suit, but that jury determination must be based upon competent evidence and not inflammatory innuendos.

CONCLUSION

Defendant-Petitioner has not affirmatively demonstrated that the trial court abused its discretion in granting Plaintiff a new trial. In this case, as is in the overwhelmingly majority of others, the reviewing court should defer to the discretionary determination of the trial judge who is in a better position to observe prejudicial acts or testimony and their effects on the jury. The cause before this Court is rendered even more straightforward by the decision of the trial judge having been affirmed by a unanimous Illinois Appellate Court and the Supreme Court of the State of Illinois.

Respondent respectfully requests that the decision of the Illinois trial judge, and the Appellate Court, and the State Supreme Court be affirmed, and that this Petition for

a Writ of Certiorari be denied.

Respectfully submitted,

MORRIS B. CHAPMAN
ROBERT W. BOSSLET, JR.
CHAPMAN AND CARLSON
1406 Niedringhaus Avenue
Granite City, Illinois 62040

Attorneys for Respondent
Ulecious Buchanan

No. 80-1772

MAY 28
ALEXANDER L.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

v.

ULECIOUS BUCHANAN,
Respondent.

REPLY BRIEF

JOHN B. GUNN
JAMES CHRISTOPHER COOK
WALKER AND WILLIAMS, P.C.
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000
Attorneys for Petitioner

June, 1981

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

Page

Table of Citations i

Introduction

I. Respondent does not contest the fact that his attorney repeatedly employed offensive racial characterizations in front of the jury, while neither racial references nor offensive characterizations were made in front of the jury by petitioner railroad's attorney 2

II. The Illinois Supreme Court was properly petitioned for leave to appeal and this Court's jurisdiction is properly invoked under 28 U.S.C. §1257(3) 3

III. The questions are important 4

Conclusion 6

TABLE OF CITATIONS

Estelle v. Williams, 425 U.S. 501, 509-513, 96 S.Ct. 1691, ____, 48 L.Ed.2d 126, 134-135 (1976)..... 5

Hall v. Chicago & Northwestern Ry. Co., 5 Ill.2d 135, ____, 125 N.E.2d 77, 84 (1955) 3

Harris v. Pennsylvania R.R. Co., 361 U.S. 15, 27-28, 80 S.Ct. 22, ____, 4 L.Ed.2d 1, 9 (1959) 5

---

* A listing of petitioner's corporate affiliations is contained on page i of the Petition.

Kavanaugh v. Washburn, 387 Ill. 204, ____, 56 N.E.2d 420, 423 (1944) 3

Miranda v. Arizona, 384 U.S. 436, 498, 86 S.Ct. 1602, ____, 16 L.Ed.2d 694, 737 (1966) 4

Robbins v. Professional Construction Co., 72 Ill.2d 215, ____, 20 Ill.Dec. 577, 579-580, 380 N.E.2d. 786, 788-789 (1978) 4

Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 509, 77 S.Ct. 443, ____, 1 L.Ed.2d 493, 501 (1957) 5

Illinois Supreme Court Rule 315(a) (Ill.Rev.Stat. 1979, ch. 110A, par. 315(a)) 3

28 U.S.C. §1257(3) 3,4

No. 80-1772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALTON & SOUTHERN RAILWAY COMPANY,
a Corporation,
Petitioner,

v.

ULECIOUS BUCHANAN,
Respondent.

REPLY BRIEF

INTRODUCTION

Respondent's response to the petition for writ of certiorari does not seriously challenge any of the grounds petitioner has advanced in support of the petition.

First, and most significantly, the response does not deny that this Court possesses a self-imposed obligation to closely scrutinize all cases brought under the Federal Employers' Liability Act where it appears that the litigants have been improperly deprived of the jury's determination. Second, the response does not dispute that the facts of this case, as recited in petitioner's statement of the case, are accurate. It is thus admit-

ted that respondent's attorney failed to properly and timely object to the testimony of Dennis Korando which was, belatedly, said to be prejudicial. The response merely excuses respondent's attorneys' failure to utter a specific and timely objection on grounds of prejudice as an additional objection which was implicit in his objection that he was surprised by the appearance of Dennis Korando as a witness at trial. Finally, the response is patently misleading insofar as it implies that the unpublished order of the Illinois Appellate Court could not be appealed to the Illinois Supreme Court. As will be further described herein, appeal to the Illinois Supreme Court is expressly authorized by an amendment to the Rules of the Illinois Supreme Court and by a decision of that Court more recent than the case relied upon by respondent.

Respondent's other arguments in defense of the order of a new trial have been previously addressed in the petition for writ of certiorari.

I. Respondent Does Not Contest The Fact That His Attorney Repeatedly Employed Offensive Racial Characterizations In Front Of The Jury, While Neither Racial References Nor Offensive Characterizations Were Made In Front Of The Jury By Petitioner Railroad's Attorney.

The response refers to conversations occurring in chambers between the trial judge, respondent's attorney and petitioner's attorney without making it clear that the use of language like "fag" and "creature" was not used by the court in front of the jury. The response does not even acknowledge that these offensive sexual and racial characterizations were first employed by him. It is evident from the record that neither the trial judge nor petitioner railroad's counsel engaged in offensive language before the jury. In contrast, however, respondent's attorney repeatedly characterized the person waiting for respondent outside the railroad yard as a "creature" and "black thing." (R.

365-368) Respondent does not dispute the fact that such references were never made in front of the jury by petitioner railroad's attorney. (R. 392-393, 406-407 & 421) In short, this Court should be aware of the fact that the offensive characterizations described in the response were not made in front of the jury — except for the offensive characterizations employed by respondent's own attorney.

II. The Illinois Supreme Court Was Properly Petitioned For Leave To Appeal And This Court's Jurisdiction Is Properly Invoked Under 28 U.S.C. §1257(3).

The response implies that neither the Illinois Supreme Court nor this Court have jurisdiction to hear an appeal of the order of a new trial. Respondent's contention, however, is false. Illinois Supreme Court Rule 315(a) (Ill.Rev.Stat. 1979, ch. 110A, par. 315(a)) provides that petitions for leave to appeal from the Illinois Appellate Court to the Illinois Supreme Court may be filed by any party "* * * in any case not appealable from the Appellate Court as a matter of right." In the instant case, pursuant to Illinois Supreme Court Rule 306 (Ill.Rev.Stat., 1979, ch. 110A, par. 306), the appellate court granted the railroad's petition for leave to appeal from an order granting a new trial. Illinois Supreme Court Rule 306 does not establish the mechanism whereby a litigant may appeal from the appellate court's determination to the Illinois Supreme Court. That mechanism is provided under Rule 315(a).

The case relied upon by respondent, *Kavanaugh* v. *Washburn*, 387 Ill. 204, ____, 56 N.E.2d 420, 423 (1944), construed predecessors of Illinois Supreme Court Rules 315(a) and 306, and held that there was no appeal from the Illinois Appellate Court to the state Supreme Court relative to affirmances of orders granting new trials. See also *Hall* v. *Chicago & Northwestern Ry. Co.*, 5 Ill.2d 135, ____, 125 N.E.2d 77, 84 (1955). More recently, however, the Illinois Supreme Court distinguished *Kavanaugh* and *Hall* saying that the current Supreme Court

Rules abolished the arduous procedural course charted in those cases. *Robbins* v. *Professional Construction Co.*, 72 Ill.2d 215, ____, 20 Ill.Dec. 577, 579-580, 380 N.E.2d 786, 788-789 (1978). In *Robbins,* the Supreme Court noted that under the current rules, once the appeal process has ended relative to appeal of an order granting a new trial, later appeals cannot address the propriety of the trial court's initial grant of a new trial. Thus, under Illinois Supreme Court Rule 315(a) and the *Robbins* case, the Illinois Supreme Court does indeed have jurisdiction to accept an appeal concerning issuance of a new trial order. The jurisdiction is expressly confirmed as part of the general discretionary jurisdiction of the Illinois Supreme Court. In cases where there is a direct appeal of a new trial order, as is the case here, there can be no relitigation of the issue of whether the allowance of a new trial was appropriate. Of significance to this Court is the fact that there can be no relitigation of the question of whether or not the factfinding of the jury was improperly overthrown by the trial court's allowance of a new trial, even though the alleged error on which that order was based was waived by not being timely objected to at trial.

Because the Illinois Supreme Court had jurisdiction to hear this appeal under Illinois Supreme Court Rule 315(a) and under the *Robbins* case, it is readily apparent that the decision of the Illinois Appellate Court constituted a final judgment under 28 U.S.C. §1257(3). *Miranda* v. *Arizona,* 384 U.S. 436, 498, 86 S.Ct. 1602, ____, 16 L.Ed.2d 694, 737 (1966).

III. The Questions Are Important.

The response contends that this case does not present special and important reasons for granting the writ. In essence, respondent contends that the trial court had broad discretion in ordering the new trial and that such an exercise of discretion is not reviewable by this Court. On the contrary, as numerous decisions of this Court state, the litigant's right to jury trial will be

jealously guarded by this Court which will exercise its power of review in any case where it appears that the litigants have been improperly deprived of the jury determination. E.g., *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500, 509, 77 S.Ct. 443, ____, 1 L.Ed.2d 493, 501 (1957). The ground relied upon by the trial court in ordering a new trial was entirely waived by respondent's failure to object to the allegedly prejucial testimony of Dennis Korando or to urge the specific ground of prejudice in opposition to Korando's testimony. Waiver also indicates that the supposed prejudice was neither apparent to the Court and counsel at the time Korando testified nor was present in the record. Such failures by respondent's attorney have been held sufficient to negate any allegation of error before this Court. *Estelle* v. *Williams*, 425 U.S. 501, 509-513, 96 S.Ct. 1961, ____, 48 L.Ed.2d 126, 134-135 (1976). Finally, this case presents an important question in that the intended scope of judicial supervision of jury verdicts in FELA cases or the enunciation of meaningful standards to guide the lower courts in the exercise of their supervisory function have never been announced by this Court. This case squarely presents this important issue whose time has come. *Harris* v. *Pennsylvania R.R. Co.*, 361 U.S. 15, 27-28, 80 S.Ct. 22, ____, 4 L.Ed.2d 1, 9 (1959) (dissenting opinion of Mr. Justice Harlan).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, petitioner respectfully submits that a writ of certiorari should be granted.

Respectfully submitted,

John B. Gunn
James Christopher Cook
Walker and Williams, P.C.
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000
Attorneys for Petitioner

June, 1981